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Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1628

TELEPROMPTER CORPORATION AND CONLEY ELECTRONICS CORPORATION, *Petitioners,*

v.

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, a joint venture, JACK CHERTOK TELEVISION, INC., and DENA PICTURES, INCORPORATED, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES AND REGULATIONS INVOLVED	4
STATEMENT	5
A. The CATV Industry	6
B. The Facts in This Case	7
1. Brief Summary of Respondents' Contentions and Holdings Below	8
2. Television Broadcasting and Reception	10
The function of broadcasting	10
The function of reception	11
The function of petitioners' CATV systems	11
3. "Distant Signals"	12
4. The CATV Systems Involved in This Petition	16
THE DECISIONS BELOW	19
THE REASONS FOR GRANTING THE WRIT	23
1. THE DECISION BELOW CONSTRUCTED A NEW RULE ENLARGING THE COPYRIGHT MONOPOLY, THEREBY RAISING AN IMPORTANT ISSUE UNDER THE COPYRIGHT LAW AS TO THE PUBLIC'S RIGHT TO USE A "NEW AND VITAL TECHNOLOGY" TO RECEIVE BROADCASTS	23
2. THE COURT BELOW ADOPTED A RULE WHICH CONVERTS RECEPTION AND DISTRIBUTION OF BROADCAST SIGNALS INTO A "PERFORMANCE" IN DISREGARD OF THE FORTNIGHTLY HOLDING	29

Page

3. The Novel Doctrine of the Court Below of a Television Market Area Bounded by the Court's Antenna Technology Disregards the Undisputed Record That Petitioners' CATV Subscribers are Within the Coverage Area of the "Distant" Stations as a Matter of Law and Industry Economics 34

(a) The F.C.C., and not the copyright proprietor, is authorized under the Communications Act to establish the areas to be served by television stations 35

(b) The court's "market" rule disregards the evidence on television economics which is in the record 39

4. The Decision Below Disregards the Primary Policy of the Copyright Act 42

5. The Rule of the Court Below Threatens the Economic Viability of CATV and by Its Vagueness Will Engender a Flood of Litigation 44

6. The Decision Below Conflicts with the Communications Act and F.C.C. Regulation of CATV 47

7. The Court Below Rejected the License Implied-in-Law Under the Copyright Act and the Communications Act to Receive Broadcasts Licensed by the Copyright Owner 51

Conclusion 53

Appendix A 1a

Appendix B 29a

Appendix C 58a

Appendix D 61a

TABLE OF AUTHORITIES

Page

CASES:

Allen Bradley Co. v. *Local Union No. 3*, 325 U.S. 797 (1945) 50

Aro Manufacturing Co. v. *Convertible Top Replacement Co.*, 377 U.S. 476 (1964) 43, 53

Buck v. *DeBaum*, 40 F.2d 734 (S.D. Cal. 1929) 43, 51

Buck v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) 51

Farmers Union v. *WDAY*, 360 U.S. 525 (1959) 50

Fortnightly Corp. v. *United Artists Television, Inc.*, 392 U.S. 390 (1968) ..2, 6, 8, 10, 11, 19, 20, 21, 23, 24, 29, 30, 31, 32, 33, 34, 35, 36, 37, 43, 46

Hughes Tool Co. v. *Trans World Airlines, Inc.*, 41 U.S.L.W. 4131 (U.S. Jan. 10, 1973) 50

Land v. *Dollar*, 330 U.S. 731 (1947) 24

Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) 24

Mazer v. *Stein*, 347 U.S. 201 (1954) 42, 52

National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 48

Pan American World Airways, Inc. v. *United States*, 371 U.S. 296 (1963) 50

Select Theatres v. *Ronzoni Macaroni Co.*, 59 U.S.P.Q. 288 (S.D.N.Y. 1943) 32, 33

United Artists Television, Inc. v. *Fortnightly Corp.*, 255 F. Supp. 177 (S.D.N.Y. 1966), *aff'd*, 377 F.2d 872 (2d Cir. 1967), *rev'd*, 392 U.S. 390 (1968) 2, 20, 34

United Artists Television, Inc. v. *Fortnightly Corp.*, 377 F.2d 872 (2d Cir. 1967), *affirming* 255 F. Supp. 177 (S.D.N.Y. 1966) 2, 10, 22, 31, 34, 35, 42, 51

United States v. *General Motors Corp.*, 323 U.S. 373 (1945) 24

United States v. *Midwest Video Corp.*, 406 U.S. 649 (1972) 5, 49

United States v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948) 43, 52

United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 5, 20, 29, 30, 31

STATUTES AND RULES:

Page

Communications Act of 1934:

47 U.S.C. § 151 4
47 U.S.C. § 153(o) 4, 10, 14, 28, 52
47 U.S.C. § 303(c) 4
47 U.S.C. § 303(d) 4, 35
47 U.S.C. § 303(g) 48
47 U.S.C. § 303(h) 4, 28, 35
47 U.S.C. § 307(b) 4
47 U.S.C. § 325(a) 4
47 U.S.C. § 501 15
47 U.S.C. § 605 15

Copyright Act:

17 U.S.C. § 1(c) 3, 4, 8
17 U.S.C. § 1(d) 3, 4, 8

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1338 2

Code of Federal Regulations:

47 C.F.R. §§ 21.700 et seq. 15
47 C.F.R. § 21.709 15
47 C.F.R. § 73.683(a) 25, 30
47 C.F.R. § 73.684 25
47 C.F.R. § 74.1101(i) 25, 30
47 C.F.R. § 74.1103 49
47 C.F.R. § 74.1103(a) 25
47 C.F.R. Part 76 5
47 C.F.R. Part 76, Subpart D 5
47 C.F.R. Part 76, Subpart F 12
47 C.F.R. § 76.54 27
47 C.F.R. § 76.57 49
47 C.F.R. § 76.59 49
47 C.F.R. § 76.61 49
47 C.F.R. § 76.63 49
47 C.F.R. § 76.151 ..... 26, 37
47 C.F.R. Part 78 5
47 C.F.R. § 78.5(a) 15
47 C.F.R. § 78.5(b) 15
47 C.F.R. § 91.559 15
47 C.F.R. § 91.561 15

Page

SPECIAL REPORTS AND ORDERS OF THE F.C.C.:

First Report and Order on Microwave-Served CATV, 38 F.C.C. 683 (1965) 12

Second Report and Order on Community Antenna Television Systems, 2 F.C.C. 2d 725 (1966) 12

Shen-Heights TV Association, et al., 11 F.C.C. 2d 814 (1968) 49

Letter of Intent (Cable Television Proposals), 31 F.C.C. 2d 115 (1971) 27

Cable Television Report and Order, 36 F.C.C. 2d 141 (1972) 4, 24, 25, 38, 47, 49

Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order, 36 F.C.C. 2d 326 (1972) 5, 24, 25, 27, 37, 38, 40

TEXTS:

Nimmer, *Copyright*, (1972) 52

Television Factbook, 1972-73 Ed., No. 42, Services Volume 6

Television Factbook, 1972-73 Ed., No. 42, Stations Volume 40

MISCELLANEOUS MATERIALS:

Record, Vol. IV in *Fortnightly Corp.* v. *United Artists Television, Inc.*, Supreme Court, No. 618, (1967 Term) 45

Comments of the U.S. Department of Justice Before the Federal Communications Commission, Docket No. 18,397 (1969) 28

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners TelePrompTer Corporation and Conley Electronics Corporation ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 8, 1973.

OPINIONS BELOW

The opinion of the court of appeals is not yet officially reported and is annexed hereto as Appendix A., pp. 1-28.* The opinion of the United States District Court for the Southern District of New York is reported at 355 F.Supp. 618 and is annexed hereto along with the judgment of the court as Appendix B, pp. 29-57. It also appears in the printed record below[1] at pages 103-42.

JURISDICTION

The judgment of the court of appeals here sought to be reviewed was entered on March 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the district court was based on 28 U.S.C. §1338.

QUESTIONS PRESENTED

In *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968),[2] this Court held that a Community Antenna Television (CATV) system which receives and amplifies signals broadcast by television stations and distributes the signals to subscribers' homes where the subscribers can view the program on their own sets did not perform the broadcast copyrighted programs.

The court of appeals held that petitioners' CATV systems, when they receive and distribute signals

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* The formal judgment of the court of appeals has just become available and is annexed hereto as Appendix D, pp. 61-62.

[1] The Joint Appendix in the court below will be cited hereafter as "JA"; the Joint Exhibit Volume will be cited as "JE".

[2] This Court reversed *United Artists Television, Inc.* v. *Fortnightly Corp.*, 377 F.2d 872 (2d Cir. 1967), *affirming* 255 F.Supp. 177 (S.D.N.Y. 1966).

broadcast from television stations, are performing, and hence infringing, copyrights of the programs being transmitted by such signals if the originating (TV station) community and the CATV community are different communities, and if the CATV antenna on which the signals were received is not "in", "near" or "directly adjacent to" the community being served by CATV, unless the petitioner can meet the "heavy burden" of showing that such signals, which the court terms "distant signals", "would be equally receivable off-the-air in the first instance and would project an image of similar quality if there were substantially similar receiving equipment located in or adjacent to the CATV community."

The court held that such reception and distribution constitutes a performance and infringement even though they were authorized by the Federal Communications Commission, and even though the CATV community is included in the originating station's coverage area as a matter of television industry economics.

The questions presented on this petition are as follows:

(1) Whether the reception by petitioners' CATV systems of television signals (broadcast by the station with the copyright owner's authorization for public reception) and the distribution of those broadcast signals to subscribers should be converted into a "performance" of the program "in public" within the meaning of §§ 1(c) and 1(d) of the Copyright Act because the signals are "distant signals"?

(2) Whether the court below announced a rule contrary to the policies of the Copyright Act and the Com-

munications Act in imposing copyright infringement liability on CATV systems, thus denying members of the public the right to select CATV antenna service to receive broadcasts licensed by the copyright owner?

(3) Whether the statutory monopoly granted by the Copyright Act should be judicially extended to hold a CATV system liable for reception of "distant signals" whose reception is authorized under the FCC regulatory scheme, and when such an extension would be in conflict with one of its key elements?

(4) Whether, when a copyright owner has licensed a broadcast (which under the Communications Act is "intended to be received by the public"), a homeowner's right to receive the broadcast through an antenna service of his choice is protected by a license implied-in-law under the Copyright Act and the Communications Act?

STATUTES AND REGULATIONS INVOLVED

1. *Copyright Act.* Section 1(c) and 1(d) of the Copyright Act (17 U.S.C. §§ 1(c), (d)), are set forth in Appendix C, p. 58.

2. *Communications Act of 1934, as amended.* Sections 1, 3(o), 303(c), (d), and (h), 307(b) and 325(a) of the Communications Act of 1934, as amended (47 U.S.C. §§ 151, 153(o), 303(c)(d), and (h), 307(b) and 325(a)) are also set forth in Appendix C, pp. 59-60.

3. *FCC Regulation of CATV.* The Federal Communications Commission has adopted detailed and comprehensive regulations regarding the antenna service which CATV systems can make available to mem-

bers of the public to receive broadcasts. 47 C.F.R. Part 76 and Part 78.[3]

The Commission discussed in detail the history of, and reasons for, its cable regulations in its *Cable Television Report and Order*, 36 F.C.C. 2d 141 (1972)[4] and its *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 F.C.C. 2d 326 (1972).[5] The regulations included authorization to CATV systems to make available to subscribers (as provided in the regulations) broadcast signals, including "distant signals" whose reception and distribution the court below found to constitute an infringement.[6]

STATEMENT

This petition seeks review of the decision of the court of appeals that the operation of petitioners' CATV systems in receiving certain signals broadcast by television stations and transmitting those signals to homes of subscribing members of the public constituted a "public performance" of the broadcast copyrighted programs because the antenna on which these signals could be received was not in or near the CATV

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[3] The Commission's jurisdiction to promulgate the regulations was upheld in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), and in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972).

[4] Referred to hereinafter as "*Cable Television Report and Order.*"

[5] Referred to hereinafter as "*Memorandum Opinion and Order on Reconsideration.*"

[6] *Cable Television Report and Order, supra*, n. 4, ¶ 89, at 177; 47 C.F.R., Part 76, subpart D.

community. Respondent CBS has frankly stated[7] that it "seeks a definitive determination of the issue of copyright liability" in view of alleged developments in CATV systems since the closing of the *Fortnightly* trial record, and has openly prosecuted this case to distinguish or limit this Court's *Fortnightly* holding.

A. THE CATV INDUSTRY

There are now nearly 3,000 CATV systems serving more than 5,000 communities. These CATV systems provide reception service to an estimated 7 million homes.[8] An estimated 650 CATV systems with approximately 2.3 million subscribing homes receive some "distant signals" whose reception by the CATV for its subscribers would appear to fall under the rule of copyright liability announced by the court below. Of these CATV systems, approximately 50% are dependent on "distant signals" for their subscribers to receive full network services (i.e., the signals of at least one station affiliated with each of the three major networks broadcasting its entire line of network programs).[9] Geographically, these CATV systems are

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[7] Affidavit of CBS Counsel, Asa D. Sokolow, dated July 14, 1969, submitted in support of Motion for Leave to File First Supplemental Complaint.

[8] *Television Factbook, Services Volume*, No. 42, 1972-1973 Ed., pp. 75a, 363(a).

[9] These figures are based on analysis of the CATV systems using microwave, and signals they receive, as reported in the *Television Factbook, supra* n. 8, which is a standard and widely accepted source of industry data. In view of the lack of clarity in the court's rule (see discussion, pp. 44-47, *infra*), many CATV systems other than those using microwave may also be receiving "distant signals" by reason of their antennas being located more than a "few miles" from the CATV community. However, there never has been any reason for collection of information on antenna locations, and thus no such data is available on an industry basis.

primarily located west of the Mississippi (although there are some in areas in the Eastern United States), and in small and medium sized communities. Thus, this petition raises an issue of substantial immediate importance to a large number of persons dependent on CATV in these communities for their television reception.

B. THE FACTS IN THIS CASE

There is essentially no dispute as to the facts concerning the operation of petitioners' CATV systems. Two lengthy stipulations cover much of the detail (JA 148-291).

Petitioners own and operate CATV systems in a number of communities. Three systems in Farmington, Great Falls and Rawlins are involved in this petition. Respondents own programs on which copyright was assumed for purposes of the trial of the first stage.[10] CBS, acting on its own behalf and pursuant to contract with other respondents, authorized the telecast of these programs. The programs were broadcast in the regular course by the television stations. Each of petitioners' CATV systems operated 24 hours a day and received and distributed to its subscribers the signals broadcast by the stations referred to in the complaint.

The broadcast signals were received off-the-air on television receiving antennas and distributed through

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[10] Pursuant to pretrial orders (JA 71-72, 101) the issue of whether the operation of petitioners' systems constituted a public performance of the copyrighted works, and the issue whether such operations in aiding reception by the public of broadcasts licensed by the copyright owner were protected by a license implied-in-law under the Copyright Act and the Communications Act, were tried in the first stage separately from other defenses and issues.

microwave and cable connections from the antenna where the signals were received to the subscribers' homes.[11] The broadcast signals received were made available to subscribers instantaneously and in their entirety by petitioners' CATV's in the same manner for all broadcast signals received. Respondents have stipulated that any subscriber who may have viewed the program was not guilty of copyright infringement.

1. Brief Summary of Respondents' Contentions and Holdings Below.

A brief summary of respondents' various contentions is necessary in order to explain intelligibly the facts pertinent to this petition. Respondents brought this action seeking an injunction and damages on the ground that the reception service provided to the public by the CATV systems constituted a "performance ... in public" of the copyrighted works under §§ 1(c) and 1(d) of the Copyright Act. In the district court and in the court below, respondents' claims of infringement were based on several contentions as to differences between petitioners' operations and those of the *Fortnightly* CATV's.

First, respondents contended that certain activities of petitioners' CATV systems [12] which were conducted

[11] Subscribers provide their own television sets. Petitioners did not rent, sell or repair sets. There is no evidence in the record that any subscriber actually viewed these programs.

[12] Certain of petitioners' CATV systems originated programs and made them available to subscribers on channels not used for the reception of telecasts (so-called "local origination"). For local originations, the CATV secured copyright licenses where copyrighted material was involved. In addition, one of petitioners' systems (New York City) sold a very few commercials in connection with such locally originated programs on a *non*-broadcast

on separate channels not used for the reception of broadcast signals (so-called "*non*-broadcast channels") tainted the CATV reception service and thereby converted the reception of broadcast signals on other channels into a "performance" of the broadcast programs. The district court and the court of appeals rejected this contention, and it is not discussed in this petition.

Second, respondents contended that petitioners' use of point-to-point microwave connections between the receiving antennas and the CATV communities made the CATV operation functionally like a broadcaster because the signals were transmitted through the air. The district court and the court of appeals found that microwave was point-to-point communication analogous to a wire and rejected this contention. Microwave is not discussed in this petition except in the general context of the "distant signal" issue.

Third, and as pertinent to this petition, respondents contended that the reception of signals which could not be received on local antennas (so-called "distant signals"), where the CATV was alleged to be outside the station's "normal coverage area", changed the CATV's reception function into a broadcast function and therefore made the CATV a "performer".

After trial, the district court issued an opinion (discussed *infra,* pp. 19-20) rejecting all of respondents' contentions. Having concluded there was no infringement, the court did not consider whether there

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channel. Moreover, respondents pointed to two instances in 1964 and 1965, when several of petitioners' CATV systems carried the same originated program (Ali-Liston heavyweight championship fights) on a non-broadcast channel, and the "inter-connection" through the telephone company facilities was alleged to be functionally like a network.

was a license implied-in-law to protect the public's use of CATV service to receive telecasts. Although the court of appeals affirmed the district court's ruling as to the first two categories of respondents' contentions, it reversed with respect to the third contention. In its opinion (discussed *infra,* pp. 20-22), the court constructed a rule of law under which a CATV's reception of any "distant signal" constitutes a "performance."[13] This petition challenges this holding of the court of appeals limiting and distinguishing this Court's *Fortnightly* decision.

2. Television Broadcasting and Reception.

The function of broadcasting. Broadcasters secure programs, directly or through the networks, and convert them into television signals which are broadcast for reception by the public.[14] The license issued to a broadcaster authorizes him to use a designated frequency in the publicly owned spectrum for the statutory purpose of broadcasting for reception by the public. A broadcaster has a specific personal responsibility for all programs which he broadcasts. The F.C.C. has made it clear that broadcasters

> "must assume responsibility for all material which is broadcast through their facilities. This includes

[13] The court also reaffirmed its holding in *Fortnightly*, 377 F.2d at 880-884, that reception by the public was not protected by a license implied-in-law.

[14] Broadcasting is defined by the Communications Act (47 U.S.C. § 153(o)) as follows:

> " 'Broadcasting' means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations".

The technology of television broadcasting is set out in detail in the stipulations (JA 165-174).

> all programs and advertising material which they present to the public .... This duty is personal to the licensee and may not be delegated" (JE 493).

The function of reception. To receive a broadcast there must be a receiving antenna and a connection between the antenna and the television set to conduct the signal to the set. If the antenna built into the set is not satisfactory, a member of the public can secure a better antenna. The quality of the reception will depend on the antenna or antenna service the homeowner chooses and the quality of his receiving set.

The function of petitioners' CATV systems. Petitioners' CATV systems have well placed receiving antennas and provide a connection from these antennas to the homes of subscribing members of the public. With respect to three systems (Farmington, Great Falls and Rawlins), the court below found reception of "distant signals" which under its rule distinguished *Fortnightly* and changed the reception function of the system into a broadcasting function. In all of these cases, the antenna where the "distant signal" was received was located outside the community where the CATV was located.[15]

With respect to reception of all broadcast signals, both those which are "distant signals" under the rule of the court below and all other signals, petitioners had no control over and no knowledge of what programs were to be broadcast. The broadcasts were not edited in any way. The subscriber received both the

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[15] See the brief description of these three CATV systems, pp. 16-19, *infra*. The stations received, the receiving antennas used, and the connections between these antennas and the subscribers' sets are described in detail in the stipulations (JA 186-192, 220-228, 235-240, 267-271).

"distant signals" and the nondistant signals as broadcast, including station identification and commercials, and made his own selection of what station and program he wished to view. The CATV systems received and made available all broadcast signals received—both "distant signals" and nondistant signals—without alteration or concern for their content, except where under F.C.C. rules they were required to give "nonduplication protection".[16]

Petitioners provided subscribers with a connection to the CATV system for a fixed monthly charge in the range of $5-$7.50, regardless of whether the viewer's set was used and what programs, if any, the homeowner actually viewed.[17]

3. "Distant Signals".

Respondents' contention that when a "distant signal" is received, the CATV is not performing a reception function but a broadcasting function, was accepted by the court below, *but only with respect to those telecasts.*[18] It is clear that there is no engineering defini-

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[16] Beginning in 1965, the Commission adopted rules establishing priority as to stations to be received by a CATV system. Under the rules, the CATV systems were required on demand to receive and carry certain stations and to block out or give nonduplication protection of the same program broadcast by lower priority stations. *First Report and Order on Microwave-Served CATV,* 38 F.C.C. 683 (1965); *Second Report and Order on Community Antenna Television Systems,* 2 F.C.C. 2d 725 (1966). The nonduplication rules are now in 47 C.F.R. Part 76, Subpart F.

[17] There was an installation charge in the range of $10-$20, and an additional monthly charge for connection to additional television sets.

[18] Respondents had also argued that reception and distribution of any distant signals converted the CATV entirely to a broadcasting function, and thus made the CATV a "performer" of all signals received—even those broadcast by stations in the same community as the CATV.

tion of the term "distant signal".[19] Respondents offered no testimony as to the significance of any particular distance from the television station to the CATV community as defining the limits of what constitutes reception as against a performance by the CATV system. Nor was any testimony offered as to any basis for distinguishing between larger and smaller distances.[20] Indeed, one of respondents' witnesses (Moore) testified that the New York City CATV system in receiving the New York City TV stations was importing "distant signals" because the terrain and tall buildings made the signals "unavailable to some people except on CATV".[21]

Respondents' basic contention was founded on what they assert is the desirable economics for a copyright owner. A television station, it was argued, had a "coverage area" or "market area." CATV reception outside that "market area" involved importation of "distant signals" into areas where they were not intended by the copyright proprietor to go and that reception was argued to be converted into performance.

Respondent offered no precise boundaries of the "market area" or "coverage area." To the extent that

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[19] Respondents' engineering expert (Davis) conceded that he did not "really know how you define a distant signal". JA 345.

[20] Respondents' witness (Gray), referring to reception by a CATV system in Utica in which he formerly had an ownership interest, saw no significance in distances of 100-130 miles and did not view such reception as changing the CATV reception function (JA 381, 387). Respondents' expert (Davis) referred to reception at distances of 130 miles (JA 356), and petitioners' expert (Cohen) referred to reception at distances of 150-180 miles (JA 477-478).

[21] JA 406-408. Reception in New York City is impaired in many locations because the buildings or terrain block the signal, or else the signal "bounces" off the buildings causing "ghosts" and poor reception (JA 476-477, 501-502).

respondents offered any delineation, it was based on an argument that the F.C.C. fixes the height and power of a TV station and that the "market area" is that where house-top-antenna reception is possible.

The record shows that while a broadcaster's license specifies the location, height and power of the broadcasting antenna and equipment, it does not specify any particular area to be served or mark any limits as to reception by the public. The broadcaster is merely authorized "to use and operate the radio transmitting apparatus" described in the license "for the purpose of broadcasting" [22] which as required by statute must be "intended to be received by the public" (47 U.S.C. § 153(o)).

The only regulations on the public's choice of receiving antennas are the FCC-CATV regulations, which authorize entrepreneurs to provide members of the public a CATV reception service. The reception and carriage of all "distant signals" here involved was in conformity with the F.C.C. regulations.

Indeed, the record shows that the F.C.C., by granting microwave licenses, specifically authorized the reception of the distant signals found to be infringing. The Farmington, Great Falls, and Rawlins systems which received the allegedly infringing "distant signals" had receiving antennas located a number of miles from the community in which the CATV was located (for details see discussion *infra,* pp. 17-19). The connection between the CATV's antenna where the signals were received and the cable distribution

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[22] See F.C.C. Form No. 352B, Television Broadcast Station License, included in record at JE 486-87.

system in the CATV community was provided by microwave.[23]

Since microwave transmission is through the air and uses radio frequencies, all uses of microwave must be licensed by the F.C.C.[24] The regulations specifically regulate microwave links for transmission of broadcast signals to a point "from which the signals are distributed to the public by cable." (47 C.F.R. § 78.5 (b), *formerly* 47 C.F.R. § 74.1001(f)).[25] In applying for a microwave license, the applicant must describe the service intended. The applications covered, and the licenses authorized, the use of microwave in connection with identified stations to be received and the transmission of those signals to the identified CATV systems, where the signals are distributed by cable to subscribers.[26] All microwave links used by petitioners' systems were licensed under these rules.

Moreover, the record is filled with uncontroverted evidence demonstrating that, as determined by the economics of the television industry, petitioners' CATV

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[23] As the district court found (App. B, 40; 355 F.Supp. at 623) and the court below affirmed (App. A, 17-18) microwave transmission is not broadcasting since it is not intended to, and indeed cannot be, received by the public. Microwave is point-to-point transmission analogous to a wire or cable. Unauthorized reception of microwave by the public constitutes a violation of 47 U.S.C. § 605 subject to criminal penalties provided in 47 U.S.C. § 501.

[24] The general F.C.C. regulations "Point-to-Point Microwave Radio Service" (47 C.F.R. §§ 21.700 *et seq.*) cover all microwave uses both for common carriers such as AT&T as well as "microwave to relay television signals to community antenna television systems." *Id.* § 21.700.

[25] See also 47 C.F.R. §§ 21.709, 78.5(a), *formerly* 74.1001(a), 91.559, 91.561.

[26] JA 160; JE 359-72, 386-88.

systems were within the coverage area of the so-called "distant stations" and the CATV subscribers were counted as part of the audience of those stations. See detailed discussion of this evidence, *infra*, pp. 39-41.

The television industry—stations, networks, advertisers and program suppliers—measure the audience of a station or network or their share of the viewing audience by the use of rating services. The record contains excerpts from these rating-service reports pertinent to the television stations in question, and showing the inclusion of the CATV subscribers in the stations' audiences. The record also contains explicit evidence that these surveys, which included CATV subscribers in the audience, were used by stations in their business, and were used by copyright owners (e.g., witness Reel and respondent Chertok) in promoting the licensing of their programs. A then President of CBS has stated that the selection of network affiliates, the rates paid to affiliates, and the pricing of network time to advertisers are influenced by audience size.[27] Thus, the audiences exploited by the stations, networks and copyright owners including the CATV subscribers.

4. The CATV Systems Involved in This Petition.

The complaint charges infringement by reception of broadcasts in November 1964, June 1969 and March, 1971. Three of the systems received "distant signals" within the holding of the court of appeals:

(i) the Farmington CATV, with respect to reception of the Durango station in 1969 and 1971 and a Los Angeles station in 1971;

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[27] JE 358, 374, 378-80, 384-85, 461, 494-99, 520-522; JA 508-13.

(ii) the Great Falls CATV, with respect to reception of a Spokane station in 1969;

(iii) the Rawlins CATV, with respect to reception of Denver stations in 1969.[28]

The facts with respect to these three systems reflected by the record are as follows:

Farmington.[29] In November 1964 and June 1969 Farmington was a five-channel system. In 1964 the signals of four Albuquerque broadcast stations (144 miles from Farmington)—an affiliate of each network and an educational station—were received off-the-air on an antenna on a mesa about 30 miles from Farmington and by microwave transmitted to the community where they were distributed by cable to subscribers.

In 1969 the only change was that Farmington received the CBS affiliate in Durango (43 miles from Farmington) when the Albuquerque educational station was not broadcasting. Under the F.C.C. rules referred to above (*supra*, p. 12 n.16), Durango was entitled to (and did) demand reception and carriage of its signals on the Farmington CATV. Reception of the Durango station in Farmington is blocked because of mountains. The station and the CATV entered into

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[28] Respondent also contended that distant signals were received, and alleged infringement for this reason, by the Farmington CATV in 1964, 1969, and 1971 by reason of its reception of Albuquerque stations, and by the Elmira CATV in 1964 by reason of its reception of stations in Buffalo, Scranton, Syracuse, and Binghamton, but the court below did not agree. See *infra*, p. 19, n. 36.

[29] For stipulated details, see JA 184-204, 266-75.

an agreement with respect to the carriage of Durango.[30]

In 1970 the Farmington system was rebuilt with a 12-channel capacity. Microwave licenses were received authorizing the reception of the broadcasts of four Los Angeles stations to be made available to the Farmington CATV subscribers. The system continued to receive and carry the signals of the four Albuquerque stations and the Durango station.[31]

Rawlins.[32] In June 1969 the Rawlins CATV had 12-channel equipment. The system received six broadcast stations, including five from Denver (184 miles from Rawlins)—an affiliate of each network, an independent, and an educational station—which were received off-the-air on antennas located approximately 90 (and 100) miles from Denver and transmitted by authorized microwave link to Rawlins where the signals were distributed by cable to the subscribers.[33] The

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[30] JE 344-46. The court below treated the reception of the Durango broadcasts as an infringing reception of a "distant signal". (App. A, 27-28. (The Durango CBS affiliate in 1969 and 1971 broadcast the same program as the Albuquerque CBS station. The complaint specifically charges the reception of the Albuquerque station as an infringement. It does not refer specifically to the Durango station (JA 51, 88).

[31] The court below assumed erroneously that the complaint did not charge infringement by reason of the reception of broadcasts of a Los Angeles station. App. A, 25-26. In fact, the second supplemental complaint (Seventeenth Claim) charges infringement by reason of the reception in Farmington of a broadcast of Los Angeles station KTTV (JA 89-91).

[32] For stipulated details, see JA 234-245.

[33] The sixth station carried on the Rawlins CATV was a station in Casper (87 miles away) whose signals were not generally receivable in Rawlins except via authorized rebroadcasts of a translator located there. It was received by the CATV off-the-air on an antenna on a tower located on a hill on the edge of Rawlins.

Denver stations are the closest stations which could be received to provide subscribers with full services of all three networks, as well as any independent and educational stations (J.A. 549).

Great Falls.[34] In June 1969 Great Falls was a 12-channel system. It received nine broadcast stations. Three of the stations, including the one which broadcast the allegedly infringed program, were in Spokane (286 miles from Great Falls), one in Lethridge, Canada (163 miles from Great Falls), two in Salt Lake City (466 miles), and Helena (71 miles). The signals of these stations were received off-the-air on antennas closer to the station (17 miles to 95 miles) and transmitted by microwave to the system, where the signals were distributed to subscribers by cable.[35] The Spokane stations are the closest stations which could be received enabling subscribers to receive full network service (JA 536).[36]

THE DECISIONS BELOW

1. The district court analyzed the function played by the CATV systems in receiving and making broadcast signals available to subscribers. Applying the *Fortnightly* test as to the function of a CATV system

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[34] For stipulated details, see JA 218-233.

[35] The Great Falls system also received two stations located in Great Falls.

[36] The court below rejected respondents' contentions that the Albuquerque stations were distant stations for the Farmington CATV on the ground that their programs were available off-the-air in Farmington from translators located in or near Farmington. App. A, 26-27. The court also rejected the argument that the Elmira CATV received distant signals involved in this case since the signals of the CBS affiliates were all received on antennas on a tower in Elmira. App. A, 25.

in the process of television broadcasting and reception, the court held that the operation of petitioners' systems was on the viewer's side of the line and did not perform the copyrighted works. App. B, 42-54; 355 F.Supp. at 624-30.[37] With respect to the "distant signal" contention accepted by the court below, the district court noted that in *Fortnightly,* the CATV system carried the programs to additional viewers, viewers the district court in *Fortnightly* had found could not receive on their own antennas. What petitioners had done, the court concluded, "is to make its own antenna even more 'well located' and even more 'efficiently' connected to a viewer's set than in *Fortnightly.*"[38] App. B, 50; 355 F.Supp. at 628.

2. The court of appeals affirmed the district court's decision on all contentions except that relating to "distant signals." *Fortnightly,* the court said, did not involve a CATV system which brought a signal "from another television market". App. A, 18. The court stated that in *Fortnightly* the signals were "already in the community" by reason of the location of the receiving antennas "in or directly adjacent" to the CATV communities. App. A, 18.

Hinging its decision upon language in *United States* v. *Southwestern Cable Co., supra,* the court below con-

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[37] Upon analysis, the court rejected the other contentions of respondents as to the operation of petitioners' systems: microwave (App. B, 44; 355 F.Supp. at 625), "interconnection" (*Ibid*), advertising (App. B, 44-45; 355 F.Supp. at 625-26), sale of commercials (App. B, 45; 355 F.Supp. at 626) and program origination (App. B, 50-52; 355 F.Supp. 628-29).

[38] Since the court found no "performance," it had no occasion to consider whether the CATV reception service was protected by a license implied-in-law.

cluded that a CATV performed a different function when it was distributing signals that are "beyond the range of local antennas". App. A, 19. This did not constitute, the court said, use of "improved antenna technology" as in *Fortnightly*, but rather "importation of the signal . . . from a separate, distant community." App. A, 20. Thus, when a CATV distributes signals "that are beyond the range of local antennas", the CATV "to this extent" is "functionally equivalent to a broadcaster", and should be "deemed to 'perform' the programming distributed to subscribers on these imported signals." App. A, 19.

Much of the court's opinion was devoted to a definition of "distant signals." It recognized that a "precise judicial definition" is "not possible". App. A, 21. A "distant signal" is one which could not be received, the court concluded, "in light of current broadcasting and receiving technology" on an antenna located in or near the CATV community and produce an image of "similar quality" to that from the antenna closer to the station. The court created a "presumption" that, where a CATV's antennas were not located in or near the CATV community, the signals would be considered "distant" unless the CATV could carry the "heavy burden" of showing to the contrary. App. A, 22-24.

The court made clear that while it spoke of "distant signals", distance was not the key element. The key apparently is whether the signal is receivable in the community. Thus, where mountainous terrain blocked reception of the Durango signal in Farmington and the CATV antenna was on a mesa 30 miles out of town, the court held the CATV reception was an infringing reception of a "distant" signal although Farmington was only 43 miles from Durango and with-

in the Durango's station "B contour".[39] This distance to the antenna location was too great to satisfy the court's rule that the receiving antenna must be "near or adjacent to" a CATV community.

In applying its rule, the court said that Denver TV station signals received and distributed to the Rawlins CATV subscribers and the Spokane signals received and distributed to Great Falls CATV subscribers were "presumptively" distant signals, although it remanded so that petitioners could attempt to carry the "heavy burden" of proving that the signals were receivable in these communities under its rule.[40]

The court erroneously stated that no programs broadcast by Los Angeles stations were at issue (App. A, 25-26) and did not state whether its rule of presumptive liability applied.[41] The rule would, however, clearly apply to this factual situation.[42]

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[39] JA 186. See note 48, *infra*.

[40] The court expressly doubted that petitioners would carry the burden (App. A, 26), and did not mention the stipulations of the parties that "television reception directly off-the-air by house-top antennas or tower-mounted antennas is not feasible in Great Falls [and Rawlins] from these Spokane [Denver] stations" (JA 219, 234).

[41] The Seventeenth Claim for relief charged infringement from the reception by the Farmington CATV system of signals of the Los Angeles station KTTV (JA 89-91). There was also a stipulation that the Los Angeles broadcasts could not be received "by housetop antennas or towered-mounted antennas" in Farmington (JA 266-67).

[42] The court addressed the issue of a license implied-in-law to protect the public's right to use the CATV antenna service in three footnotes, (App. A, 24, 27, n. 18-20), holding that it need not reach the issue. In its decision in *Fortnightly*, 377 F.2d at 880-884, the court stated that a license implied-in-law might apply only where the signals were receivable in the community on house-

THE REASONS FOR GRANTING THE WRIT

1. The Decision Below Constructed a New Rule Enlarging the Copyright Monopoly, Thereby Raising an Important Issue Under the Copyright Law as to the Public's Right To Use a "New and Vital Technology" To Receive Broadcasts.

The court below has decided an important question of federal law which has not been but should be settled by this Court and before any further proceedings below based on such decision. The court below decided that three of petitioners' CATV systems were not within the ambit of *Fortnightly* because they received "distant signals" under the court's definition. Proceeding upon its erroneous reading of *Fortnightly,* the court below remanded the case to the district court to afford petitioners an opportunity to carry the "heavy burden" of showing that the "distant signals" carried on the Farmington, Great Falls, and Rawlins CATV's could have been received by an "equivalent antenna" located "in or adjacent to" the CATV community. The court of appeals expressly doubted that Petitioner could meet that burden of proof. (App. A, 26). The court referred to the stipulation that the Durango station could not be received on housetop antennas in Farmington but it apparently overlooked the stipulation that the Los Angeles stations could not be received in Farmington on "housetop" or "tower-mounted" antennas and a similar stipulation with respect to reception of Denver and Spokane stations in Rawlins and Great Falls. (JA 267, 219, 234)

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top antennas. In view of its ruling that the claims with respect to the Elmira and New York City CATV did not involve "distant signals", and that the Albuquerque signals were not distant because of the rebroadcasts of translators located near Farmington, the court stated that it had no occasion to consider whether their reception was also protected by a license-in-law.

Even assuming that some issues of fact were to be open on remand despite the stipulations of the parties, the rule constructed by the court of appeals should be reviewed now to resolve issues "fundamental to the further conduct of the case" *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).[43] The holding of the court of appeals in this case as to "distant signals" is "fundamental" to any further proceedings herein and raises a clear question as to the applicability of the Copyright Act as interpreted by *Fortnightly*.

A further reason for review by this Court at this time is that the rule adopted by the court below would deny to the public the right to receive broadcasts by using CATV service contemplated under the regulatory scheme adopted by the FCC with the objective of "the ultimate integration of cable television into the nation's communications structure. . . ."[44] The Commission's regulation "to get cable moving so that the public may receive its benefits, and to do so without jeopardizing the basic structure of over-the-air television"[45] had a threefold objective.

A major objective of the Commission's regulation was to make a "new and vital technology"[46] available to the public for reception of broadcasts. Since electronic interference between broadcasting stations prevents licensing of multiple television stations in every

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[43] See also *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) and *Land* v. *Dollar*, 330 U.S. 731 (1947).

[44] *Memorandum Opinion and Order on Reconsideration, supra*, n. 5, ¶ 5 at 328.

[45] *Cable Television Report and Order, supra*, n. 4, ¶ 58 at 164.

[46] *Memorandum Opinion and Order on Reconsideration, supra*, n. 5, ¶ 3, at 328.

community, cable television was viewed by the Commission as a way viewers in small towns could get diversity and the degree of service which otherwise only viewers in a few large cities receive.[47] A basic part of the plan was to authorize the reception of "distant signals." The Commission thereby made it possible for entrepreneurs to provide CATV reception service (and other non-broadcast services which the Commission found in the public interest) and for the public to have the benefit of that service to get variety and diversity.

A second aspect of the Commission's plan has been to give stations the benefit of CATV carriage. Thus, the Commission required that CATV systems receive and carry "local stations".[48] The Commission's definition of "local stations" was given a specialized meaning for "policy reasons" to aid stations and did not mark the boundary of reception.[49] The court below

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[47] *Cable Television Report and Order, supra*, n. 4, ¶ 88, at 176-77.

[48] Originally, the FCC regulations required carriage of all signals where the CATV system was within the Grade B contour of the station. 47 C.F.R. § 74.1101(i); *id.* § 74.1103(a) (1967). The Grade B contour is a line based on an engineering calculation where good reception may be expected 90% of the time at 50% of the locations. 47 C.F.R. § 73.683(a); *id.* § 73.684.

This compulsory carriage requirement was enlarged by the Commission in its recent decisions referred to above to include additional stations beyond the Grade B contour, where the Commission found that their signals were "significantly viewed". *Cable Television Report and Order, supra*, n. 4, ¶ 74, at 170-71; *Memorandum Opinion and Order on Reconsideration, supra*, n. 5, ¶ 50 *et. seq.*, at 345.

[49] See *supra*, n. 16, and discussion of the compulsory carriage rule in the *Cable Television Report and Order, supra*, n. 4, ¶ 74-87, at 170-176 and in *Memorandum Opinion and Order on Reconsideration, supra*, n. 5, ¶ 50 *et seq.*, at 345.

applied its rule to find infringement by the Farmington CATV by reason of its reception of signals from the Durango station in the face of the FCC regulations requiring the CATV to receive and carry that station.

The third aspect of the Commission's plan was to integrate CATV into the national communications structure in such a way as to balance the public interest in the reception of broadcasts and the interests of the copyright owners. Thus, under the compulsory carriage rule under which a station can demand to be received and carried (see *supra*, pp. 12 n.16, 17-18), the CATV was required to give nonduplication protection —black out the same program received from other stations. The Commission has referred to this as "instantaneous exclusivity". In addition, the Commission adopted rules as to exclusivity of syndicated programs broadcast by "distant stations" which the CATV was authorized to receive. 47 C.F.R. § 76.151.[50]

A substantial number of CATV systems (see discussion, *supra*, p. 6) currently receive "distant signals" within the court's rule, and residents of these communities are dependent on the CATV for their television reception.[51] The effect of the court's rule

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[50] See discussion *infra*, p. 37.

[51] A good example of such a community is Rawlins, an isolated community of approximately 10,000 people in south central Wyoming. Only one station is receivable off-the-air on house-top antennas in Rawlins, and this only by means of translator rebroadcasts. With petitioner's CATV system, Rawlins residents receive full network service, an independent and an educational station from Denver, the nearest major market. There are numerous other such communities throughout the Western United States where the "spacing" between television stations is much greater than in the East because of thinner population.

will be to deprive these citizens of the opportunity through CATV of receiving the full television service enjoyed by members of the public living in larger metropolitan areas.

The Commission's survey of "significantly viewed signals" for its compulsory carriage rule indicates that there are more than 1,500 counties in the United States which do not have what the Commission has called minimum television service.[52] Thus, the rule of the court below throws into jeopardy the television service now received by a large segment of the public and would deny minimum television service to many more people in areas now underserved. Providing this minimum television service to the public throughout the United States was, of course, a principal basis for the Commission's regulatory scheme for CATV.

CBS has made clear that, while it is not seeking large damages against petitioners in this action, it intends to use the copyright monopoly to cut off all CATV service which it regards as not consistent with its concept of "the present system of nationwide program distribution by the television networks through their affiliated stations . . . ." JE 470. As the Department of Justice has said, "[t]he major television networks have an economic interest in the limited number

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[52] The determination as to significantly viewed signals (defined in 47 C.F.R. § 76.54) is set out in the *Memorandum Opinion and Order on Reconsideration, supra*, n. 5, at 378. Of the counties listed, 66 had only one significantly viewed signal; 414 had two signals and 1,028 had three signals.

The Commission defined the number and choice of stations which it regarded as "minimum standards of adequate television service" in its *Letter of Intent* (*Cable Television Proposals*) 31 F.C.C. 2d 115, 120 (1971) as three full network stations and one to three independent stations depending on the classification of the market.

of channels of access to the public which the present television system provides; and this general interest clearly conflicts with the large-scale development of CATV as a means of access to the viewing public." [53] Thus, the copyright proprietors may well follow a policy of refusing to license CATV in many "distant signal" situations in order to carry out their market separation purposes.

Moreover, even if copyright proprietors were willing to license CATV, there is no mechanism by which CATV operators could effectively negotiate with the numerous program suppliers for copyright licenses. The CATV operator does not know or control in any way the "distant signal" programs to be broadcast, and thus has no way of knowing who he should ask for permission. But even if such an organization or mechanism for negotiation of clearances did exist, there would be nothing to negotiate with major copyright owners such as CBS who intend to use the copyright monopoly to maintain market separation in their own private economic interest.

What is at stake is not a conflict between two businesses, but the right of the public to use whatever technology it chooses to receive broadcasts. A broadcaster is licensed to use a part of the public spectrum for broadcasting, and the statute expressly commands that broadcasting must be "intended to be received by the public . . ." 47 U.S.C. § 153(o). The "areas or zones to be served by any station" are within the explicit authority of the Commission. 47 U.S.C. § 303(h). See

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[53] *Comments of the U.S. Department of Justice Before the Federal Communications Commission*, Dkt. No. 18,397 at 21, n. 11 (1969) (investigation regarding ownership of CATV systems by broadcasters and other media).

discussion *infra,* pp. 35-38. Under the novel rule of the court below, only those segments of the public using the conventional receiving-antenna technology the court approved can benefit from the public's statutory right to receive broadcasts, and the networks and copyright owners are now granted specific authority to use their copyrights to deny television-reception technology and service to the public, thereby delineating markets and controlling the structure of the television industry.

2. The Court Below Adopted a Rule Which Converts Reception and Distribution of Broadcast Signals into a "Performance" in Disregard of the Fortnightly Holding.

This Court in *Fortnightly* rejected the claim of the copyright owner that the reception and distribution of television signals to subscribers was a performance. In reaching that conclusion it analyzed the function of CATV systems and the function of broadcasters. It concluded that CATV was unlike a broadcaster and that the CATV service was on the "viewer's side of the line." 392 U.S. at 399.

In reaching its conclusion that the reception function of a CATV system is converted into a performance if the reception involved what it called "distant signals," the court below rested its decision (App. A, 18-19) on language used by this Court in *United States* v. *Southwestern Cable Co., supra,* 392 U.S. at 163:

> "CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae."

Southwestern involved no copyright issue, and, we submit, the court below misread *Southwestern* as limiting the rule in *Fortnightly*. In *Southwestern*, the issue was the authority of the Commission to regulate CATV. The specific rule which was before the Court was the compulsory carriage rule under which a broadcaster could demand that a CATV system carry and give nonduplication protection to specified stations. The compulsory carriage rule did not apply to "distant signals". In a footnote to the part of the opinion relied upon by the court below, this Court said (392 U.S. at 163, n. 16):

> "The term 'distant signal' has been given a specialized definition by the Commission, as a signal 'which is extended or received beyond the Grade B contour of that station.' 47 CFR § 74.1101(i). The Grade B contour is a line along which good reception may be expected 90% of the time at 50% of the locations. See 47 CFR § 73.683(a)."

This footnote explaining this Court's reference to "distant stations" was not discussed by the court below, but when the *Southwestern* opinion and *Fortnightly* are read together [54] in light of this footnote, we submit it is clear that the function of an antenna service, *so far as concerns copyright infringement,* depended on the location of the receiving antenna. In *Fortnightly,* four of the five stations which were received by the Clarksburg system and one station received by the Fairmont system were "distant signals" under this

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[54] The two cases were argued together and were decided within a short time of each other.

rule.[55] In light of this, the court below recognized that the specialized definition of "distant signals" which this court referred to in *Southwestern* had no copyright significance; it therefore devised its own definition of "distant signals", which has no reference to that used by this Court in *Southwestern* and which, we submit, the court below incorrectly regarded as a limitation on *Fortnightly's* holding.

While the court uses the word "distant", it is clear that distance is not the sole operative fact. Durango is a short distance from Farmington (43 miles) and Farmington is within the Durango B Contour (a "local signal" under the FCC rule). Yet, Durango is classified by the court as a "distant" signal, although Buffalo which is 119 miles from Elmira is not.

The court below did not say what legal device converted the CATV reception of a "distant" signal into a performance. The rule of the court below revives a form of the contention decisively rejected in *Fortnightly* that performance turned on the equipment technology.[56] As the district court found, petitioners' CATV systems merely had a better located antenna and a more efficient connection to the antenna than the *Fortnightly* CATV's. The sensitivity and location of receiving antennas becomes the key to copyright infringement under the rule of the court below.

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[55] This Court made no explicit reference to this undisputed fact in *Fortnightly*, but this fact was noted by the court below in its opinion in *Fortnightly*, 377 F. 2d at 883 . This Court did refer, however, to the fact that the Fortnightly CATV's provided the signals to "additional viewers." 392 U.S. at 400.

[56] Petitioners' CATV's used the same kind of (and in some cases, identical) equipment as that used by the *Fortnightly* CATV's.

The decision appears to rest on the court's assertion that the function of receiving and distributing signals beyond the range of local antenna's is "functionally equivalent to a broadcaster" and therefore the CATV "should be deemed to 'perform' the programming distributed to subscribers on these imported signals." (App. A, 19). But the court below made no analysis of the function of a broadcaster as compared to a CATV or as to how petitioners' reception of "distant signals" became like, or even more like, a broadcaster's function than a viewer's function.[37]

The operation of petitioners' CATV systems was precisely the same whether or not a distant signal was received. The CATV did not broadcast or rebroadcast in either case. It did not select programs to be broadcast. With respect to both "distant" and non-distant signals, it merely carried, without editing or change, the signals of programs broadcast for public reception and made them available to subscribers. In all cases, it received the signal off-the-air and simultaneously made the signal available to subscribers, exactly as the CATV in *Fortnightly* did.

The court below referred to only one other case—*Select Theatres* v. *Ronzoni Macaroni Co.*, 59 U.S.P.Q. 288 (S.D.N.Y. 1943), which it noted was cited in *Fort-*

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[37] In *Fortnightly*, this Court said (392 U.S. at 400):

> "The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers." (Footnotes omitted.)

nightly for the proposition that "broadcasters perform". 392 U.S. at 398, n. 23. App. A, 19. *Select Theatres* involved the issue whether a broadcaster performed when it secured its program from a remote source. The program material was "piped" to the station over telephone wires. A broadcaster is personally and directly responsible for all programs which he broadcasts regardless of source. (See pp. 10-11, *supra*). He may obtain a movie from Hollywood, a record from New York, or a network program via AT&T. His responsibility in all cases is the same. He selects and procures the programs, and provides the equipment to broadcast the programs for reception by the public. Petitioners' CATV carried out none of these broadcaster functions with respect to either "distant" or nondistant signals.

One other statement by the court below sheds some light on its reasoning. The court said (App. A, 20):

> "We hold that when a CATV system imports distant signals, it is no longer within the ambit of the *Fortnightly* doctrine, and there is no reason to treat it differently from any other person who, without license, displays a copyrighted work to an audience who would not otherwise receive it."

Nowhere does the court explain what it means when it said the CATV system "displays" the program. Petitioners' systems, like those in *Fortnightly*, handle only electromagnetic energy—the broadcast signals. They do not handle or "display" the sights or sounds of the programs in any way. If the programs are in fact displayed, it is by the homeowner when he turns on his own set. And it is stipulated that the homeowner does not infringe.

Moreover, the district court and court of appeals in *Fortnightly* both held that residents of Clarksburg and Fairmont could not get adequate reception of the signals there involved without the CATV. 255 F.Supp. at 186; 377 F.2d 872, 874, 883 n. 14. This Court explicitly recognized that the *Fortnightly* CATV carried the signals to "additional viewers" (392 U.S. at 400). Thus the basis for the court below's reasoning—that petitioners made a program available "to an audience who would not otherwise receive it"—was equally present in *Fortnightly*.

Fortnightly teaches, we submit, that CATV reception of a signal broadcast for reception by the public and distribution of such signals to subscribing members of the public is not a "performance"; the CATV activities are in aid of reception and are "on the viewer's side of the line." Mere distance from the broadcaster does not change a reception function into a broadcasting function.

3. The Novel Doctrine of the Court Below of a Television Market Area Bounded by the Court's Antenna Technology Disregards the Undisputed Record That Petitioners' CATV Subscribers Are Within the Coverage Area of the "Distant" Stations as a Matter of Law and Industry Economics.

The court below made clear in a footnote (App. A, 4, n. 2) that its rationale is fundamentally based on its concept of a television "market". It reasoned that copyright owners are injured in exploiting a program, if, as a result of CATV reception the program is carried to "viewers who would not otherwise have received them". Fees which the copyright owner could receive from the "market" into which the signal was "imported" would, the court said, be less. The court went on to say that the copyright fee a broadcaster

is willing to pay turns on what the sponsor will pay, not on audience size.

Respondents have contended, echoing arguments asserted by the copyright proprietor in *Fortnightly*, that a television station's "market" is limited to that geographical area where housetop antennas can be used for reception. The court below accepted these arguments with only the slightest bow to this Court's *Fortnightly* decision. In substance, the rule of law announced by the court below is similar to the doctrine espoused by that court in *Fortnightly* that a license implied-in-law might be applicable where the broadcast could be received on housetop antennas. 377 F.2d at pp. 880-884. App. A, 24. The court below has continued the same notion of market definition it approved in *Fortnightly*, 377 F.2d at 882-83, with the sole difference that it will now accept, because of its reversal by this Court in *Fortnightly*, a "market" defined by the CATV antenna on a pole or nearby hill instead of "normal rooftop antennas." 377 F.2d at 883.

The court's "market" theory as a basis for limiting the public's right to receive is unsound as a matter of law under the Communications Act, and disregards the plain facts in the record as to how the television industry determines and exploits a station's coverage.

(a) The F.C.C., and not the copyright proprietor, is authorized under the Communications Act to establish the areas to be served by television stations.

Under the Communications Act, the F.C.C. is given the power to determine the location of stations and the "areas or zones to be served by any station" (47 U.S.C. §§ 303(d) and (h)). The rule of the court below focuses only on the location and power of stations and

disregards completely the Commission's determination of the areas or zones to be served by a station.

The reception of distant signals in this case involves the use of microwave.[58] Microwave is not broadcasting, but it is point-to-point transmission by radio waves through the air. Each use of microwave by petitioner was licensed by the F.C.C. Each of petitioners' applications for a microwave license was required by F.C.C. regulations to disclose the station to be received and the CATV system which would carry the signals.[59] When it issued the microwave license, the F.C.C. was exercising its authority to determine that the "areas or zones to be served" by the station included the CATV community.

In *Fortnightly,* where it was also argued that a television market is marked by "normal antenna" reception, this Court said (392 U.S. at 398):

> "The effective range of the broadcast is determined by the combined contribution of the equipment employed by the broadcaster and that supplied by the viewer."

In *Fortnightly,* as here, the subscribers chose the CATV service and thus "supplied" the reception equipment. Here, the equipment "supplied by the viewer" was also subject to explicit authority of the Commission, and when the Commission approved the microwave licenses, it was approving reception by the CATV subscribers,

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[58] In each of petitioners' three systems where so-called "distant" signals were involved, there was a microwave link between the receiving antenna and the cable system in the CATV community by which the signals were distributed to subscribers.

[59] See discussion *supra,* p. 15.

and thus including the CATV viewers in the area or zone to be served by the station.

The court below justified its rationale on the ground that importing "distant signals" reduced the fee which a copyright owner might get for licensing his work into the CATV market. (App. A, 4, n. 2). The same economic argument was made by the copyright proprietor in *Fortnightly*. Moreover, the F.C.C. has addressed this issue specifically, and its rules represent a balanced concern for the public's right to view and the copyright owner's interest. Thus, as the Commission pointed out, distant signal importation, particularly into small markets, is "severely limited."[60] Beginning in 1965 the Commission adopted nonduplication rules which required the CATV operator to black out a distant station when its program duplicated that of the higher priority local station.[61] This rule, which the Commission called simultaneous (and later, same-day) exclusivity, was greatly enlarged in 1972 with new rules for syndicated-program exclusivity.[62] Explaining its balanced decision of the right to receive distant signals and exclusivity protection, the Commission said:

> "The rules in this area are designed to permit copyright holders to distribute programming in particular markets either by broadcast alone or, if they wish, by both broadcast and through cable distant signal carriage."[63]

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[60] *Memorandum Opinion and Order on Reconsideration, supra*, n. 5, ¶ 39, at 341.

[61] See n. 16, p. 12, *supra*.

[62] 47 C.F.R. § 76.151.

[63] *Memorandum Opinion and Order on Reconsideration, supra*, n. 5, ¶ 41, at 342.

Thus, the Commission specifically included CATV audiences within the coverage area of the station, and at the same time did so subject to exclusivity rules which the Commission found to be in the public interest and in furtherance of its objective of integrating cable television into the national communications system. The decision of the court below would upset that balance and substitute copyright-owner regulation of the right of the public to use CATV in their private interest (whatever it may be) for the regulation by the F.C.C. in the public interest.

The Commission made clear that its regulatory scheme took into account the industry economics. It recognized that "advertisers purchase *total* audience" (emphasis in original).[64] In its deliberations, the Commission examined nine significant points of economic analysis, including "the possibility of local advertising being directed away from local stations because of distant signal competition."[65] The Commission found no injury to stations from cable operations. Indeed, its objectives included "general participation by broadcast television stations in the benefits of cable carriage."[66] The court below did not attempt to refute (or even mention) the Commission's reasoned analysis of the industry facts on these matters, and adopted a rule of law putting the determination of the "areas or zones to be served" by stations in the copyright owners' hands.

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[64] *Memorandum Opinion and Order on Reconsideration, supra,* n. 5, ¶ 46, at 344.

[65] *Id.* ¶ 47.

[66] *Cable Television Report and Order, supra,* n. 4, ¶ 92, at 179.

(b) The court's "market" rule disregards the evidence on television economics which is in the record.

The record confirms that CATV subscribers are in the station's coverage area and that a station's market is not circumscribed by a "normal antenna" concept. As Mr. Aubrey, then President of CBS, testified, television is a "mass medium"; "[m]ost advertisers are primarily interested in audience size" and normally "want to reach the largest number of prospects". Contrary to the views of the court below, Mr. Aubrey said that selection of affiliates, rates paid to affiliates by the networks and the pricing of network time to advertiser's is influenced by audience size.[67] Indeed, it is a common practice of broadcasters in soliciting advertisers, and of advertisers in selecting a station or network, to use a cost-per-thousand calculation under which the station's network's rate is divided into the size of the audience.[68]

The size of the audience on which these calculations or negotiations depend is determined in the television industry by the use of rating services. The two major rating services, American Research Bureau ("ARB") and Nielsen, use a sampling system to measure the audience. Both rating services include CATV subscribers in their audience measures and ratings,[69] and

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[67] See JE 520-21, 280-90.

[68] JA 309-10, 389-390; JE 523.

[69] ARB measures the number of homes viewing the stations located in particular cities, and its national figures are a combination of these surveys. Nielsen provides national ratings and share of audience measurements. Since CATV viewers are included in measurements of both ARB and Nielsen, the CATV audience is attributed to the stations viewed. In 1971, CATV viewers were 10% of Nielsen's national sample (JE 515).

the CATV viewers are thus attributed to the station or network. When the FCC adopted the rules specifying which distant signals could be carried, it recognized that such carriage on a regular basis should be "of benefit to broadcasters" and the station will have a "more saleable commodity to advertisers. . . ."[70] Indeed the Commission went so far as to agree that in many cases it is appropriate consideration from a broadcaster to a CATV, in order for this "distant signal" to be carried by the CATV, that the broadcaster pay microwave costs.[71]

The record disregarded by the court below included rating service reports pertinent to the "distant" stations involved here, which showed that the communities in which petitioners' CATV's were located were attributed to such stations' audience and measured along with all other areas served by the stations.[72] The record shows that stations exploit their audience, including CATV viewers, by using ARB reports and data in soliciting advertisers. Brochures and coverage maps are prepared by stations or their sales representatives from the ARB reports for use with advertisers

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[70] *Memorandum Opinion and Order on Reconsideration, supra,* n. 5, ¶ 15 at 332.

[71] *Id.* ¶ 20, at 334.

[72] ARB reports are made by county. The ARB reports in the record show Rawlins (Carbon County, Wyoming) as within Denver's coverage area, and Great Falls (Cascade County, Montana) as within Spokane's coverage area. Each year coverage maps and tables, showing viewers by county, based on the ARB reports, are published in the *Television Factbook.* See JE 525-34. The recent *Television Factbook,* Stations' Volume, No. 42, 1972-1973 Ed., shows Farmington (San Juan County, N.M.) as included in the coverage area of Los Angeles station KTTV and of the Durango station, as well as Denver station coverage in Rawlins and Spokane station coverage in Great Falls.

specifically showing CATV viewers in their audience.[73] The stations' awareness and use of CATV coverage is also shown by correspondence with CATV systems regarding reception and by station advertising in CATV community newspapers.[74]

The court below disregarded the evidence that ARB ratings are a key element in the negotiations between stations and the network with reference to the rates to be paid the affiliate for its time. Included in the record are examples from CBS' files demonstrating that stations sought and got higher rates because their audience had grown. ARB reports, which included CATV audiences, are used in the measurement of television homes served by the affiliate and influenced the rate.[75]

Two witnesses who produced programs for networks and for syndication (license to individual stations) testified that they wanted the largest network ratings to facilitate subsequent licensing. Both used Nielsen ratings for that purpose.[76]

In the face of this ample evidence in the record demonstrating how the industry itself looked at these stations' coverage areas and audiences, and without

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[73] JE 357-58, 459-68, 540; See also JA 308-09, 388-89, 510-11, 513.

[74] JE 347-58, 382-85, 389, 494-99; JA 526-27.

[75] JE 280-90. Mr. Jenks, CBS vice president, testified that the CBS "affiliate desires to emphasize every possible coverage aspect in order to attract the network and argue for higher rates" and ARB reports are "one means used for that purpose" (JA 308). For a discussion of the network-rate formula, see JE 520-22.

[76] JA 312, 439-40. Both said on cross-examination that they were "unaware" that CATV viewers were included in the sampled audience and thus influenced the rating.

any support in the record, the court below accepted amici's and respondents' self-serving "market" arguments (App. A, 4, n. 2) on which it based its rule of law that CATV reception was in some manner converted into a "performance" when distant signals were involved.

4. The Decision Below Disregards the Primary Policy of the Copyright Act.

The court below justified its interpretation on an asserted injury to the copyright owner, because CATV reception "reduces the potential audience for [a] program when it is later licensed for exhibition by a local station." (App. A, 4, n. 2). This is a repetition of the same court's view in *Fortnightly* that the CATV reception disrupted the copyright owner's right to establish and limit areas of permissible public reception in order to exploit his copyright and maximize his reward. 377 F.2d at 878. This turns the interpretation of the statutory word "performance" on harm or benefit to the copyright owner, and overlooks the fact that the copyright owner has received his reward from the broadcaster for granting permission to broadcast the work. In other words, the court below has explicitly adopted a theory defining "performance" in a manner designed to fit the copyright owner's private interest.

This Court has made clear that rewarding the copyright owner is not the exclusive or even the primary policy of the Copyright Act. " 'The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.' " *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954). The primary consideration is to make available to the public the benefit of the author's works—"to induce release to the public of the products

of [the author's] creative genius." *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

When the copyright owner selects television as a means of releasing his work, and upon receiving a reward satisfactory to him, authorizes a particular station to broadcast the work, it is then released for reception by all members of the public viewing that station.[77] Nothing in the law suggests that the public to whom the broadcast is released includes only those who use a particular kind of antenna, and does not include those who choose to use CATV. The controlling principle should be—and we submit, as established by *Fortnightly*, is—that once the copyright owner for a reward agreeable to him has authorized a broadcast of the work for public reception, he should not be entitled to select part of the broadcaster's public to be barred from receiving the telecast or as a source of a second reward, if it suits the copyright owner's economic (*e.g.*, market regulation) interest.[78]

The decision below also sanctions a result in conflict with the principles announced by this Court in *Aro Manufacturing Co.* v. *Convertible Top Replacement Co.*, 377 U.S. 476 (1964)—the copyright owner will be empowered to impose a further charge for the public's enjoyment of a telecast although he has already received a reward for release of his work by telecast for reception by that public.

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[77] *Buck* v. *DeBaum*, 40 F.2d 734 (S.D. Cal. 1929), said that when a copyright owner licenses a broadcasting station, he authorizes "any 'pick-up' out of the air that was possible in radio reception" (*id.*, at 735).

[78] See discussion of respondent CBS' special interests in market delineation, *supra*, pp. 27-28.

5. The Rule of the Court Below Threatens the Economic Viability of CATV and by Its Vagueness Will Engender a Flood of Litigation.

The measure of the threat to the CATV industry is shown by the application of the court's rule to petitioners' systems. Under the rule of the court below, three of petitioners' systems have infringed respondents' copyrights by reason of receiving so-called "distant signals". A CATV system receives at least 300 telecasts a week on each channel. At least half of these telecasts will involve a copyrighted program. The courts have not ruled on the damages for infringement by CATV.[79] If the statutory minimum of $250 per infringement were claimed and levied for each copyrighted program, the potential statutory damages could be more than $2,000,000 per year per channel on which distant signals are received. This huge potential threatens the estimated 650 systems now receiving "distant signals".

The court's rule, moreover, improperly transfers the burden of proof to CATV, and establishes an unclear test which will inevitably produce endless litigation. The court's definition of "distant signals" established a "presumption" that any signal received on a CATV antenna not located in or near the CATV community constitutes a "distant signal" unless the CATV can prove to the contrary. The rule creates a "strong presumption" where the signal is initially received by the

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[79] The issue of damages is postponed to the final stage under pretrial orders. (JA 71).

The court below commented that the infringement resulting from reception of the Durango station would "probably result in minimal damages", since the Durango broadcasts duplicated those from the CBS Albuquerque station (App. A, 28), but left open the CATV's liability for damages.

system near the television station or between the CATV community and the television station, and then transmitted to the CATV community by microwave or cable, with the CATV being under a "heavy burden" to show that the signal "would be equally receivable off-the-air in the first instance and would project an image of similar quality if there were substantially similar receiving equipment located in or adjacent to the CATV community."[80] App. A, 23.

In further amplification of its rule the court discussed what it meant by the receiving antennas being adjacent to or "near" the CATV community, and made it clear that "the distances we envision here are small", and any CATV locating its antenna "more than a few miles from the CATV community"[81] bears the "burden" of proving that the signals received are not distant. App. A, 24.

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[80] The court did not specifically discuss the situation where the CATV antenna is to one side of a line between the television station and the CATV community. Durango is an example of such a fact situation. Nor did the court refer to situations where the CATV antenna is on high ground behind the CATV community.

[81] The court below earlier stated that, by its usage of the term "CATV community" it meant the local area "served by the CATV system and designated in the franchise issued to it." App. A, 22, n. 16. But in adopting this test of nearness to the "CATV community" the court below apparently overlooked the record in *Fortnightly*. The "Clarksburg CATV" there involved provided reception service from a common antenna site to a group of small incorporated towns in addition to the town of Clarksburg, each of which issued its own franchise. Although the distances from the Clarksburg CATV's antenna site are not great (several miles, see Record, Vol. IV at 125, in *Fortnightly Corp.* v. *United Artists Television, Inc.*, Supreme Court No. 618, 1967 Term), it is not entirely clear how the test announced by the court below would have been applied to the other communities.

A review of the court's rule leaves a CATV with substantial questions as to what it has to prove. If the court literally means that the CATV copyright liability would be tested by whether "substantially similar receiving equipment located in or near the CATV community" could "equally" receive "an image of similar quality" to that received by receiving equipment used by the CATV "in or near the originating community", it states an impossibility. Although an acceptable signal may be received by antennas at substantial distances (e.g., over 80 miles from Pittsburgh to Clarksburg as was involved in *Fortnightly*), the antenna installation would not likely be "substantially similar" if it was located close to the station. Would the Clarksburg CATV have infringed if it had had a simpler antenna installation receiving the Pittsburgh stations located closer to Pittsburgh?

The court earlier stated that the range of a signal was "a function of many factors, including the current state of broadcast and reception technology." App. A, 20. What, then, is the meaning of the phrase "in a similar fashion by an equivalent antenna"? Can the CATV show reception in its community with a receiving device developed by new or different technology but not "substantially similar" or "equivalent" to those it has used? Would the identical activities of the CATV cease being "deemed" a performance if it continued to use its old antennas and equipment after such a new technological development? The court below left only a small opening for new reception technology despite this Court's discussion of this point in *Fortnightly*.

Thus, the test announced by the court below will impose on every CATV having an antenna site more than

a "few miles" from a franchise area the burden of proving that it meets a vague and uncertain test as the price of not being an infringer. Certainly every system using microwave for the connection from an antenna site to its community will be forced to litigate, with the burden on it, or accede to the copyright owners' demands. And the court's mention of the possibility of investigation into a CATV's "motivation" (App. A, 24) in the location of its antenna site raises the possibility of litigation involving even systems not using microwave. The uncertainty in this test and the inevitable litigation which will follow must necessarily result in disruption to CATV service to the public.

6. The Decision Below Conflicts With the Communications Act and F.C.C. Regulation of CATV.

The "distant signal" rule of the court below frustrates the objectives of the F.C.C. regulatory scheme for CATV and is in direct conflict with one part of that scheme. The F.C.C. designed its complex interrelated regulations of CATV, guided, it said, "by the standard of what will best serve the public interest and not by a desire to protect any industry from the impact of new technology." [82] The regulatory scheme had four "interwoven" elements designed as a "single package". [83] The major elements included television broadcast signal carriage including distant signals carriage, the provision for the use of nonbroadcast channels and regulations as to minimum channel capacity. [84]

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[82] *Cable Television Report and Order, supra* n. 4, ¶ 58, n. 32 at 164.

[83] *Id.* ¶ 11, at 147.

[84] *Id.*

The regulatory scheme the Commission adopted is based upon, and carries out, its statutory obligation "to encourage the larger and more effective use of radio in the public interest" (47 U.S.C. § 303(g)) and "to secure the maximum benefits of radio to all the people of the United States."[85] Since each aspect of the F.C.C. regulatory scheme is "interwoven" into a "single package" because "each part has impact on all the others," the rule of law announced below (which undermines the distant-signal regulations) threatens the Commission's entire objective for CATV.

The court below based its rule on a supposed harm to the copyright owner's freedom to exploit his copyright in the way he chooses. But it is precisely the balancing of the public's right to reception and to minimum television service with the copyright owner's interest in exclusivity which formed the basis of the Commission's decision to permit carefully limited reception of distant signals. At the same time, it was this reception service of distant signals the Commission hoped would enable cable television to offer its service, particularly in large cities, and give the public in smaller communities the diversity and variety of programming which only those in the larger cities can get on housetop antennas. The Commission said:

> "We hope to give cable impetus to develop in the larger markets without creating an unacceptable risk of adverse impact on local broadcast television service. At the same time, those limits should serve to create an incentive for the development of those nonbroadcast services that represent the long-term promise of cable television and are criti-

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[85] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217 (1943).

> cal to the public interest judgment we have made."[86]

Not only does the decision below threaten to undermine the whole "interwoven" scheme of CATV regulation, but as applied by the court in one situation, it is in direct conflict with one key element in the scheme. As the Commission states:

> "Our general policy has been to require that cable systems carry all Grade B signals (§ 74.1103)."[87]

The obligation of carriage arises "even though a viewable off-the-air picture is not available in any part of the CATV community."[88] Applying its rule of law, the court below held that the Farmington CATV's reception of the Durango station was an infringement, since the signals were blocked by a mountain and the parties had stipulated that they could not be received in Farmington (App. A, 27).[89] Farmington is within the Grade B contour of the Durango station, and pursuant to the F.C.C. rules, after demand by the Durango

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[86] *Cable Television Report and Order, supra*, n. 4, ¶ 60, at 165. These included rules requiring CATV to originate programming and make access channels available to government and the public. The local-origination rule was upheld in *United States* v. *Midwest Video Corp., supra.*

[87] *Cable Television Report and Order, supra* n. 4, ¶ 37, at 157. The obligation of carriage under the new regulations also extends to stations which meet the significantly-viewed test. 47 C.F.R. §§ 76.57, 76.59, 76.61 and 76.63.

[88] *Shen-Heights TV Association, et al.*, 11 F.C.C. 2d 814 (1968) cited in *Cable Television Report and Order, supra*, n. 4, ¶ 42, at 159.

[89] Despite the stipulation, the court purports to leave open to petitioners on remand an opportunity to show that Durango could be received on an antenna in or near Farmington and thus was not a "distant" signal (App. A, 28).

station for carriage, an agreement was entered into between the Farmington CATV and the station for such carriage.[90] Such a construction of the Copyright Act—finding infringement when the CATV was required by F.C.C. regulation to do the acts which are seized on as the basis for such finding—is not consistent with the policy of statutory construction announced by this Court. See *Farmers Union* v. *WDAY*, 360 U.S. 525 (1959).

The extension of the copyright monopoly under the rule of the court below puts the Copyright Act in conflict with the policies of the Communications Act favoring free public reception of licensed broadcasts. The principle that statutes applicable to the same subject matter should be construed to harmonize rather than conflict has particular application here, where a novel extension of the copyright monopoly would interfere with a comprehensive regulatory scheme under another statute applicable to the same activity. Cf. *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, 806 (1945).[91]

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[90] To avoid the blockage of the signals by the mountains, the antenna was placed on the mesa 30 miles away and brought into the CATV cable distribution system in the community by microwave.

[91] See also *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 41 U.S.L.W. 4131 (U.S. Jan. 10, 1973). Respondents, here, as in *Hughes*, attempt to subvert by private law suit a decision of a federal regulatory agency specifically authorizing action in the public interest, arrived at after inquiry pursuant to a comprehensive regulatory scheme.

7. The Court Below Rejected the License Implied-in-Law Under the Copyright Act and the Communications Act To Receive Broadcasts Licensed by the Copyright Owner.

The court below discussed in a footnote (App. A, 24, n. 18) Petitioners' contention that even if the reception of "distant signals" is a performance, the CATV reception service is protected by a license implied-in-law under the Copyright Act and the Communications Act where the copyright proprietor has authorized the broadcast. Such an implied-in-law license was suggested, and the issue reserved, by this Court in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191, 199 n. 5 (1931), *citing Buck* v. *DeBaum, supra,* in which such a license was upheld.

The court below had rejected this contention in *Fortnightly* on the finding, which it explicitly approved, that the *Fortnightly* subscribers could not receive the broadcasts on their own antennas, but, recognizing that the issue was one of substance, reserved the issue whether a license would be implied where subscribers could receive the broadcasts on "normal antennas." 377 F.2d at 883-84. The court below in this case refused to reconsider its prior ruling and concluded that, in view of its ruling that a signal is not a "distant signal" if it can be received on an antenna in or near the CATV community, there was no occasion to consider whether there was a license implied-in-law under its reservation in *Fortnightly.*

The primary policy of the Copyright Act is to make available to the public the benefit of the author's works (see discussion, *supra* pp. 42-43). The reward to the copyright owner is a "secondary consideration" justi-

fied only by its contribution to the primary objective. *Mazer* v. *Stein, supra.*[92]

When respondents decided to use broadcasting for exploitation of their works, and authorized a performance of their works to be broadcast for public reception, they subjected their limited copyright monopoly to the statutory scheme of broadcasting. Under the Communications Act, the frequency spectrum used for radio and television broadcasts is a public resource, which a broadcaster can use only to provide service to the public. Since the public is intended to receive and enjoy the broadcast, and the copyright owner has been paid his royalty for the performance which was broadcast, he must be deemed to have licensed public reception of the broadcast free of additional copyright charges, and the public must accordingly be held to have a license implied-in-law to receive that broadcast for private viewing by the use of equipment of their choice—including reception aided by a CATV system such as petitioners—without being subject to a second royalty or restrictions imposed by the copyright owner on that reception.

There is no limitation or restriction in the Communications Act as to public reception. Broadcasting is defined to mean "dissemination of radio communications intended to be received by the public." 47 U.S.C. § 153(o). Nothing in the Act suggests that "the public" means some arbitrary segment of the public determined at the will of the copyright proprietor.

It is clear that the public's implied license to receive authorized broadcasts without paying a second royalty

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[92] Accord *United States* v. *Paramount Pictures, Inc., supra,* 334 U.S. at 158. See also Nimmer, Copyright § 3.1 (1972).

to the copyright owner must also protect Petitioners, whose service the public has chosen as the means of exercising their right to receive. If Petitioners' subscribers have such a right, they must be free to enlist the services of persons such as Petitioners, if they so desire, without incurring liability for a further copyright fee. See *Aro Manufacturing Co.* v. *Convertible Top Replacement Co., supra,* 377 U.S. at 495, 498-500.

CONCLUSION

The questions presented raise issues under the Copyright and Communications Acts of substantial importance to the public, which commend themselves for decision by the Court. The petition should be granted.

Respectfully submitted,

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